Supreme Court, U.S.
FILED
DEC 29 1995
OFFICE OF THE CLERK

No. 95-830

In The Supreme Court of the United States

October Term, 1995

Attorney General of the United States of America, *et al.*,
Petitioners,

v.

John Doe, M.D., By Curtis Lavery, Executor of His Estate,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

Kirke M. Hasson
Christopher L. Byers
Pillsbury, Madison & Sutro
235 Montgomery Street
P.O. Box 7880
San Francsico, CA 94120-7880
(415) 983-1000
Counsel for Respondent

Matthew A. Coles *
American Civil Liberties Union
1663 Mission Street, Suite 460
San Francisco, CA 94103
(415) 621-2493

Patricia A. Shiu
Employment Law Center
A Project of the Legal Aid Society of San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

Lane v. Pena, No. 95-365 4
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 5
Sampson v. Murray, 415 U.S. 61 (1974) 6
School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 3

Constitution and Statutes:

U.S. Const.:
Amend. V 3
Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* 7
Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1988 & Supp. V 1993) ..... *passim*

Other Sources:

United States Supreme Court Rules, Rule 10 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-830

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

JOHN DOE, M.D., BY CURTIS LAVERY, EXECUTOR OF HIS ESTATE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action under section 504 of the Rehabilitation Act of 1973 was brought against the FBI (petitioner) by Dr. John Doe (respondent [1]), a medical doctor.

Until August, 1988, Dr. Doe performed routine annual physical examinations on FBI agents and pre-employment physicals on applicants. Dr. Doe was the only doctor the FBI used for physicals, and it had been using him for four years. Petition for Certiorari (Pet.), App. A, p. 2a; App. D, p. 67a. The FBI learned in August of 1988

---

[1] Although the respondent here is actually the estate of Dr. John Doe, this Brief in Opposition refers to Dr. Doe as "respondent" for clarity and simplicity.

that Dr. Doe had AIDS from an "unnamed source." The FBI asked Dr. Doe and the hospital at which he worked if he had AIDS. Dr. Doe and the hospital refused to say; they did say that since Dr. Doe was following accepted, federally recommended infection control procedures, there was no significant risk to the agents. Pet. App. A, p. 2a.

As the District Court later found based on unanimous expert testimony, Dr. Doe and the hospital were correct. But as the Court of Appeals noted, the FBI showed little concern about infection control, and was, rather, simply interested in whether or not Dr. Doe had AIDS. Since Dr. Doe would not answer that question, the FBI stopped using him. He then brought this action, and moved for a temporary restraining order and a preliminary injunction. Pet. App. A, pp. 3a, 7a; App. C, pp. 24a-25a; App. D, p. 67a.

The District Court denied both on the basis that Dr. Doe could not sue the federal government under section 504 because he was not a federal employee. See Hearing on Motion for Temporary Restraining Order, October 5, 1988 (Dist. Crt. Docket No. 33). After Dr. Doe moved for reconsideration, the District Court reversed that ruling. However, the District Court issued an injunction which allowed the FBI to contract with additional physicians to provide physicals, and to leave the choice of a physician to the agent. Dr. Doe's business fell off drastically, from 30-40 physicals per month to about five. Pet. App. C, pp. 24a-25a.

The case was tried from May 9 through May 17, 1989. On August 25, the District Court gave judgment for petitioners, holding that the federal government was not subject to suit under section 504 of the Rehabilitation Act, because it created no "cause of action" against the United States. See Pet. App. D, pp. 68a-77a.

Dr. Doe appealed. A few days after the decision, Dr. Doe's illness forced him to stop work. In the Court of Appeals, the government argued that Dr. Doe's incapac-

ity rendered his claim for equitable relief moot, and that the United States had not waived its sovereign immunity from claims for damages under section 504. Pet. App. C, pp. 26a, 30a. In a decision handed down August 1, 1991, the Court of Appeals agreed that the claim for equitable relief was moot, but held that the language and history of the statute made it clear that Congress had intended to waive sovereign immunity from damage claims. (The Court of Appeals also upheld a District Court ruling granting summary judgment to the head of the San Francisco office of the FBI on the basis of qualified immunity, and dismissing Dr. Doe's fifth amendment claim for invasion of privacy). Pet. App. C, pp. 26a-65a.

On remand, the District Court again ordered judgment for petitioners. The court found that the petitioners stopped using Dr. Doe because he would not say if he had AIDS, and because he did not provide the FBI with other information about risks and precautions. The failure to provide risk and precaution information, said the court, prevented petitioners from deciding if Dr. Doe was qualified, (which he must have been to be able to invoke the protections of the Rehabilitation Act). The court also ruled that Dr. Doe's failure to say if he had AIDS prevented petitioners from taking steps to "protect patients," which it impliedly held they had a right to do even though it found he posed no significant risk when he performed physicals. Pet. App. B, pp. 20a-21a.

The Court of Appeals reversed, holding: 1) that it was the FBI's obligation to discover the scientific facts about risk, not Dr. Doe's; 2) that the record established beyond any doubt that the FBI was not interested in information about risk, and that Dr. Doe was "entirely forthcoming" on the issue; and 3) that the "significant risk" standard announced by this Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) applies in the health care setting, and that, accordingly, an employer is not entitled to know if a health care employee has a disability unless the condition could pose a "signifi-

cant risk;" since the District Court found there was no significant risk here, the Court of Appeals held Dr. Doe had no obligation to say if he had AIDS. Pet. App. A, pp. 2a-9a.

After obtaining one extension of time, the government filed this petition for certiorari, raising only the question of whether the Court of Appeals' 1991 decision on sovereign immunity under the Rehabilitation Act was correct.

SUMMARY OF ARGUMENT

This Court should not grant certiorari in this case. While the government and respondent agree that the sovereign immunity question it poses is important, they also agree that This Court should address the issue in a different case, *Lane v. Pena*, No. 95-365. It would be inappropriate for This Court to exercise its discretion to "hold" the government's petition in this case pending the outcome in *Lane* because the process by which the respondent was effectively denied any substantial equitable relief, and which has kept this case alive for so many years, deprives the government of any call on This Court's equitable powers.

REASONS FOR DENYING THE WRIT

Respondent agrees with the government that the question of whether the United States has waived its sovereign immunity from damages under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) is important. Respondent also agrees that This Court should resolve that issue not in this case but in *Lane v. Pena*, No. 95-365.

What the government is asking This Court to do in this case is not to grant certiorari to resolve an important question, but to use its certiorari jurisdiction to "hold" the case pending the outcome in *Lane* in order to shield it from a modest damages exposure in this case, should

This Court decide that the United States has not waived sovereign immunity.[2]

The decision about whether to grant certiorari is discretionary. See, Supreme Court Rule 10; see also, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955). It follows that the decision to "hold" a petition for certiorari pending disposition of another case must be discretionary as well. For two reasons, This Court should decline to use its discretionary power to "hold" the certiorari petition in this case, and should allow this prolonged litigation to end at last. First, respondent was effectively prevented from obtaining meaningful equitable relief on the basis of legal arguments so untenable that they have never even been presented to the Court of Appeals, on either of the two occasions when this case was before that court. Second, this case has been kept active over seven years with a combination of legal and factual arguments which are concededly insupportable.

When the FBI stopped using respondent for physical exams, it was relatively candid about the fact that it did so because he would not say if he had AIDS. The FBI wanted to know so that if he did have AIDS, it could tell its agents, provide a second doctor as an alternate, and let the agents decide if they wished to see respondent. See Pet. App. B, pp. 13a-15a.

When Dr. Doe sought preliminary relief, the government argued (successfully) not that it had a legal right to know if he had AIDS, but rather that only federal employees may sue the United States under section 504. The District Court refused any relief. After respondent showed the court on a motion for reconsideration that under binding Ninth Circuit authority, federal employees alone are *prohibited* from suing the United States under

[2] At trial, respondent proved out of pocket losses of approximately $28,000, and asked for emotional distress damages in a similar amount.

the Rehabilitation Act, the government dropped that argument, never to raise it again.

However, the government successfully argued that any preliminary injunction should not stop it from contracting with new, additional physicians and giving the agents a choice. Again, while the government spoke of the agents' "right to choose" it invoked no such legal principle. Instead, it argued that any obligation it had not to discriminate was trumped by a newly discovered statutory obligation to use multiple contractors if possible, and a supposed limit on the power of federal courts to interfere with a statutory right to contract freely. The injunction issued by the District Court prevented the government from terminating its contract with Dr. Doe, but it allowed new contracts with others. Not surprisingly, Dr. Doe's business plummeted.

Having succeeded with its "contracting" argument, the government never mentioned it again, although it would have provided a virtually complete defense to the action.

Nine months after the FBI first stopped using Dr. Doe, the case went to trial. Although the government continued to allude to a "right to know," it never succeeded in finding a legal principle to invoke in support of such a right. Instead, having argued that its contract rights trumped section 504, and that only federal employees could sue under it, it now argued that no one could sue the federal government under section 504 for anything. Once again, the government succeeded in convincing the District Court. Three months after the trial, the court ruled for petitioners on that basis.

A few days after the court entered judgment for petitioners, respondent's illness forced him to stop work, mooting his claim for equitable relief. Once that happened, the government, which argued in the trial court that equitable relief was inappropriate under *Sampson v. Murray*, 415 U.S. 61 (1974) since damages provided an adequate remedy, had a complete change of heart. For

the first time in the Court of Appeals, the government argued that damages were completely unavailable because the United States had not waived sovereign immunity.[3]

Once the Ninth Circuit rejected that defense, the FBI attempted to argue variously that Dr. Doe had a legal obligation to provide it with information about HIV which it said it did not want, or that it had asked for information which he did not give, or that it needed to know if he had AIDS to make unspecified "accommodations." Although it again succeeded in persuading the District Court on all of these points, it largely abandoned its first point, a legal argument, in the Court of Appeals, and ultimately failed on the others for simple lack of any support in the record at all.

Thus, by the end of this case, it was clear that, as respondent had said all along, he was complying with the guidelines promulgated by the federal government's Centers for Disease Control as they existed then (and now), he posed no risk, and he had done nothing wrong. The government had abandoned all of the arguments it made, successfully, to deprive him of meaningful interim equitable relief, and had abandoned most of the arguments with which it twice defeated his claim in the District Court.

Unfortunately, by this time, respondent was dead. Now the government has decided once again that far from being an adequate remedy, damages are unavailable, and it asks This Court to use its discretionary powers to minimize liability.

It is not at all uncommon to change legal arguments as a case proceeds; and since sovereign immunity is jurisdictional, the government had every right to raise it for

---

[3] Although it dropped its argument that it could not be sued at all under section 504, the government did argue that it could only be sued under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

the first time on appeal. But it is one thing to say there is nothing improper in what a litigant has done; it is quite another to say that he or she deserves extraordinary intervention by This Court. This case should have ended long ago. This Court should not prolong it now.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

KIRKE M. HASSON
CHRISTOPHER L. BYERS
PILLSBURY, MADISON & SUTRO
235 Montgomery Street
P.O. Box 7880
San Francsico, CA 94120-7880
(415) 983-1000
Counsel for Respondent

MATTHEW A. COLES *
AMERICAN CIVIL LIBERTIES UNION
1663 Mission Street, Suite 460
San Francisco, CA 94103
(415) 621-2493

PATRICIA A. SHIU
EMPLOYMENT LAW CENTER
A Project of the Legal Aid Society of San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848
* Counsel of Record